SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

No. 268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner,*

v.

GEORGIA, SOUTHERN & FLORIDA RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the District Court erred by granting summary judgment to defendant-petitioner without giving plaintiff-respondent adequate notice and a full opportunity to be heard.

COUNTERSTATEMENT OF THE CASE

Petitioner and respondent are both railroad companies. On November 1, 1965, respondent filed in the United States District Court for the Middle District of Florida a verified complaint, pursuant to Sections 1(18)-(20) of the Interstate Commerce Act, alleging

that petitioner was undertaking the construction of a line of railroad into an area served by respondent without obtaining a certificate from the Interstate Commerce Commission, and hence in violation of the cited statutory provisions. (R. 1-7). On the same date respondent moved for a preliminary injunction to stay further construction of the extension. (R. 34).

The motion for a preliminary injunction was heard by the District Court on November 8, 1965. On that date petitioner filed a memorandum opposing respondent's motion, a motion to dismiss respondent's complaint, and four affidavits. As the Court of Appeals found, the parties treated the hearing "as limited to the question of whether the preliminary injunction should issue" and "nothing said before the hearing indicated that a summary judgment, a final judgment, might result from it." (Petition, p. 32).

Nevertheless, on January 27, 1966, the District Court entered an "order denying preliminary injunction and dismissing complaint with prejudice" holding that the evidence presented at the November 8 hearing was insufficient to make a prima facie case for respondent. (R. 129-38). Respondent appealed this judgment to the Court of Appeals for the Fifth Circuit, claiming that the District Court had erred (a) in determining that petitioner's conduct had not been shown to violate the Interstate Commerce Act, (b) in refusing to grant respondent a preliminary injunction, and (c) in dismissing the complaint with prejudice without opportunity "for amendment, pre-trial discovery and a full and fair trial." (Brief for Appellant in Court of Appeals, p. 6).

On December 29, 1966, after the filing but before the hearing of the appeal, respondent filed in the Dis-

trict Court a motion predicated on Rule 60(b) of the Federal Rules of Civil Procedure setting forth intervening circumstances that it claimed had an important bearing on the merits of the case. (Petition, p. 4). The next day, December 30, 1966, the District Court denied the motion, stating its "recognition that all matters sought by said motion to be reviewed may properly be considered by the Court of Appeals." (Petition, p. 5). Respondent's appeal from that action was consolidated by the Court of Appeals with the appeal from the original final judgment.

The Court of Appeals made no final decision in favor of either petitioner or respondent. Rather it held merely that the District Court had erred in granting summary judgment to petitioner, and in dismissing respondent's complaint with prejudice, after procedures that failed to comply with Rules 12(b) and 56(c) of the Federal Rules of Civil Procedure, and thereupon remanded the case to the District Court for further proceedings. These proceedings have not yet taken place.

ARGUMENT

Petitioner asks this Court to review a judgment which did no more nor less than reverse a summary judgment granted petitioner by the District Court, on the sole ground that respondent had not been afforded adequate "opportunity to present rebutting evidence and argument relevant to the issue of summary judgment." (Petition, p. 34). Nothing in the opinion or judgment of the Court of Appeals will prevent petitioner from defending on the merits against respondent's complaint in the District Court, or indeed from invoking before that Court summary judgment procedures in accordance with the terms of the Federal Rules of Civil Procedure.

Contrary to petitioner's statement of the question presented, the Court of Appeals did not reverse and remand the case "upon respondent's claim of changed circumstances, not of record" (Petition, p. 2), but rather for the reason stated above. Accordingly this case presents no question such as that sought to be tendered by respondent.* And even if it did, there is no showing that such a decision by the Court of Appeals would have conflicted with any decision of this or any other Court, or have involved the formulation or application of any even unusual or unconventional legal principle, much less have constituted a gross departure from accepted standards of judicial conduct.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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* It is to be noted that respondent's claim of changed circumstances, upon which the Court of Appeals did not find it necessary to pass, in fact was contained in an affidavit attached to the motion filed by respondent under Rule 60(b), the appeal from denial of which was consolidated with the appeal from the original judgment in the court below.